Supreme Court, U.S.
FILED

No. 06A546

06-935 DEC 29 2006

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In The Supreme Court of the United States

RIGOBERTO LAZO,

Petitioner,

v.

ALBERTO GONZALES
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Whether the Immigration Judge's finding of removability constitutes an "order of removal" under the Immigration and Nationality Act.

STATEMENT PURSUANT TO RULE 29.6

Petitioner does not own any share in any publicly held company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit

OPINIONS BELOW

The Immigration Judge found the Petitioner removable but granted discretionary relief under Section 212(c) of the Immigration and Nationality Act ("INA") The Board of Immigration Appeals ("BIA") vacated the discretionary relief and ordered the Petitioner removed. The United States Court of Appeals for the Second Circuit denied the Petition for Review.

STATEMENT OF JURISDICTION

The Court of Appeals entered its Opinion and Order on September 1, 2006, denying the Petition for Review. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1)

STATUTORY PROVISIONS INVOLVED

The provision of the Immigration and Nationality Act § 101(a)(47)(A), 8 U.S.C. § 1101(a)(47)(A), relevant to this Petition, is reprinted in the Appendix.

STATEMENT OF THE CASE

The Petitioner entered the United States on May 3, 1981. The Petitioner became a permanent

resident in 1990. The Petitioner was placed in removal proceedings on June 25, 1998 and was charged with inadmissibility under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act ("INA"), as a person convicted of a crime involving moral turpitude. The Petitioner conceded the charge and sought relief under Section 212(c) and a waiver of the grant of inadmissibility.

On May 29, 2003, the Immigration Judge entered a decision stating:

> It is ORDERED THAT THE RESPONDENT BE GRANTED A WAIVER UNDER SECTION 212(c) of the Immigration and Nationality Act.
>
> It is FURTHER ORDERED the respondent be readmitted to the United States as a returning lawful permanent resident and be provided with documentation consistent with that decision.

The Department of Homeland Security appealed the Immigration Judge's Decision to the Board of Immigration Appeals.

On August 31, 2004, the BIA entered a decision. In its decision the BIA stated, "Appeal is sustained and the respondent is ordered removed from the United States to El Salvador."

On September 28, 2004, the Petitioner filed a Petition for Review with the United States Court of

Appeals of the Second Circuit. The Petitioner argued that the Board of Immigration appeals could not enter a removal order in the first instance and also that the Immigration Judge's finding of removability did not constitute a final order of removal. The United States Court of Appeals for the Second Circuit held that the finding of removability constituted a final order of removal and denied the Petition for Review on September 1, 2006.

REASON FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Second Circuit in the instant case, along with the Eighth Circuit's decision in Solano-Chicas v. Gonzales, 440 F.3d 1050, 1053-54 (8th Cir. 2006) and the Fifth Circuit's in Delgado-Reynua v. Gonzales, 450 F.3d 596, 601 (5th Cir. 2006) conflict with the Ninth Circuit's decision in Molina-Camacho v. Ashcroft, 393 F.3d 937, 940-41 (9th Cir. 2004). Thus, there is a conflict in the Circuit Courts. Such a conflict is in violation of Equal Protection under the Law.

ARGUMENT

The Second Circuit in its opinion stated:

> The government's view is compelled by the INA which defines an "order of deportation"—in the disjunctive—as "the order of the special inquiry officer ... concluding that the alien is deportable or ordering deportation." 8 U.S.C. § 1101(a)(47)(A) (emphasis

> added). This definition controls here because the terms "deportable" and "deportation" (respectively) can be used interchangeably with the terms "removable" and "removal". Evangelista v. Ashcroft, 359 F.3d 145, 147 n. 1 (2d Cir. 2004). During Lazo's proceedings, the immigration judge was the "special inquiry officer." 8 C.F.R. § 1.1(1) (1996).
>
> Accordingly, the statutory requirement of an order of removal is satisfied when—as here the IJ either orders removal or concludes that an alien is removable.

The 1952 Immigration and Nationality Act, as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996) and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), states the manner in which the Attorney General is to exercise his authority to order aliens removed administratively. 8 U.S.C. 28 § 1229(a)(3) states that "an Immigration Judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien. ... Unless otherwise specified in this chapter, a proceeding under this Section shall be the sole and exclusive procedure for determining whether an alien may be removed from the United States."

AEDPA defined the term of "order of deportation." 8 U.S.C. § 1101(a)(47) states:

> A) The Term order of deportation means the order of special inquiry officer or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding the alien is deportable or ordering deportation.
>
> B) The order described under subparagraph (A) shall become final upon
>
> i) a termination by the Board of Immigration Appeals affirming such order; or
>
> ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

The regulations in effect at the time Congress passed 8 U.S.C. § 1101(a)(47) referred to Immigration Judges as the special inquiry officers, and the terms may be used interchangeably whenever they appear in the regulations on chapter 8 C.F.R. § 1.1(1) (1996). Thus, only Immigration Judges can issue an order of removal.

In Molina-Camacho v. Ashcroft, the Government also argued that the IJ's finding that an applicant is removable is equivalent to an "order" of removability. However, the United States Court of Appeals for the Ninth Circuit, in Molina-Camacho at 941, flatly rejected the government's argument. The Ninth Circuit held that:

> Accepting the Government's interpretation of the interplay between a finding of removability and an actual order of removal would render the IJ's discretionary ability to literally "cancel removal" meaningless, because a finding of removability in the first instance is a prerequisite to such discretionary relief. 8 U.S.C. § 1229b(b)(1) (providing circumstances under which "the Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States").
>
> The Government's reasoning is also flawed because it conflates the BIA's uncontested substantive power to reverse a finding of removability or eligibility for cancellation of removal on appeal with the procedural power to issue the order of removal that results from such a reversal. (Resp't's Opp'n to Pet'r's Mot. For Remand, at 7) ("Once the Board reversed the immigration

> judge's order granting cancellation of removal, there was nothing left to do, but affirm the immigration judge's finding that the Petitioner is removable, and enter an appropriate order disposing of the matter on appeal."). There is no statutory authority or case law that supports the assertion that a finding that a petitioner is removable is the same thing as an order of removal and, indeed, the Government points to none on appeal.

The Petitioner argues that the regulatory scheme also supports his argument that a finding of removability does not constitute an "order of removal.". 8 C.F.R. § 1240.13(d) states: "Decision to remove. If the immigration judge decides that the respondent is to be removed, the immigration judge shall advise the respondent of such decision, and of the consequences for failure to depart under the order of removal, including civil and criminal penalties described at sections 274D and 243 of the Act. Unless appeal from the decision is waived, the respondent shall be furnished with Form EOIR-26, Notice of Appeal, and advised of the provisions of Sec. 1240.15." Thus, the regulations require that the Immigration Judge provide the individual with a warning regarding the consequences of failure to depart under the order of removal. When an Immigration Judge makes an initial finding of removability, he or she does not provide warning regarding the consequences of failure to depart. The United States Court of Appeals for the Second

Circuit completely fails to take the above into account in its analysis. In the instant case, the record will demonstrate that when the Immigration Judge made the initial finding of removability, he did not provide warning regarding the consequences of failure to depart. The Petitioner was not provided with warning regarding the consequences of failure to depart for the simple reason that there was no "order of removal" in the instant case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

/s/

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Date: January 4, 2007

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RIGOBERTO **LAZO,** Petitioner, v. ALBERTO **GONZALES,*** Attorney General of the United States, Respondent.

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Alberto R. **Gonzales** is automatically substituted for former Attorney General John Ashcroft as respondent in this case

Docket No. 04-5188-ag

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

462 F.3d 53; 2006 U.S. App. LEXIS 22610

[Entered September 1, 2006]

May 24, 2006, Argued
September 1, 2006, Decided

PRIOR HISTORY: [**1] Rigoberto Lazo petitions for review of an order of the Board of Immigration Appeals, which [i] overturned the decision of an Immigration Judge ("IJ") to grant Lazo a waiver of removability and [ii] ordered Lazo removed. Lazo argues that the BIA has no power to issue orders of removal, and that the case must be remanded to an IJ for the issuance of such an order.

DISPOSITION: Petition for review denied.

COUNSEL: VISUVANATHAN RUDRAKUMARAN, New York, NY, for Petitioner.

SHANE CARGO, Assistant United States Attorney (Michael J. Garcia, United States Attorney for the Southern District of New York, of counsel, Sara L. Shudofsky, Assistant United States Attorney, on the brief).

JUDGES: Before: McLAUGHLIN, JACOBS, and B.D. PARKER, Circuit Judges.

OPINION:
[*53] PER CURIAM:

An Immigration Judge ("IJ") found Rigoberto Lazo removable, but granted discretionary relief in view of the time elapsed since Lazo's criminal offense. By order of August 31, 2004, the Board of Immigration Appeals ("BIA") [1] overturned the IJ's grant of discretionary relief and [2] ordered Lazo removed. Lazo petitions for review on the ground that the BIA lacks power to issue an order of removal and, if it overturns discretionary [**2] relief, it must therefore remand to the IJ for entry of the formal removal order. Because the plain statutory language commands that we treat the IJ's finding of removability as an order of removal, we deny the petition for review.

BACKGROUND

Lazo, a citizen of El Salvador, became a permanent resident of the United States in 1990. In 1992, he molested his girlfriend's minor daughter, and was convicted under New York state law of sexually abusing a child of less than eleven years. Thereafter, he married and fathered a child.

[*54] Lazo was placed in removal proceedings in 1998, and was charged as being inadmissible due to commission of a crime involving moral turpitude. Lazo conceded the charge and sought discretionary relief from removal. In 2003, the IJ granted a waiver from removability, citing the decade that had elapsed since Lazo's offense. The Department of Homeland Security appealed, and the BIA reversed the waiver in light of "the seriousness of the respondent's crime." In entering judgment, the BIA ruled that the Department of Homeland Security's "appeal is sustained and the respondent is ordered removed from the United States to El Salvador." Joint Appx. at 3 (emphasis [**3] added).

Lazo petitioned this Court for review, and this Court asked for supplemental briefing on the following question:

Whether the Board of Immigration Appeals ("BIA") has statutory authority under the Immigration and Nationality Act of 1952 ("INA"), as amended, to order the removal of an alien, or whether the BIA is instead limited to affirming or reversing an immigration judge's ruling granting discretionary relief from removal. . . .

Order of December 7, 2005.

DISCUSSION

An alien may be removed only pursuant to a valid order of removal. See 8 U.S.C. § 1227(a). Lazo argues that immigration judges have exclusive power to issue orders of removal, with the BIA limited to

affirming or overturning those decisions, and that the BIA therefore overstepped its authority in ordering removal in this case. The government argues that authority to order removal has in fact been conferred on the BIA (an argument we do not reach), and that in any event, the IJ did order Lazo's removal (as we hold) because the IJ found Lazo removable, and because--under the relevant statutory definition--a finding of removability is an order of removal, [**4] so that the Board may reinstate a previous order of removal by overturning an IJ's grant of discretionary relief.

The government's view is compelled by the INA, which defines an "order of deportation"--in the disjunctive--as "the order of the special inquiry officer . . . concluding that the alien is deportable or ordering deportation." 8 U.S.C. § 1101(a)(47)(A) (emphasis added). This definition controls here because the terms "deportable" and "deportation" (respectively) can be used interchangeably with the terms "removable" and "removal". Evangelista v. Ashcroft, 359 F.3d 145, 147 n. 1 (2d Cir. 2004); Duamutef v. INS, 386 F.3d 172, 176 n.4 (2d Cir. 2004). During Lazo's proceedings, the immigration judge was the "special inquiry officer." 8 C.F.R. § 1.1(l) (1996).

Accordingly, the statutory requirement of an order of removal is satisfied when--as here--the IJ either orders removal or concludes that an alien is removable. In that light, the BIA did not "order" Lazo's removal (as Lazo characterizes the order); the BIA has removed an impediment to the removal that was ordered by the IJ. The [**5] BIA's power to

review and overturn the IJ's grant of discretionary relief is unchallenged.

Three of four other circuits agree. See Solano-Chicas v. Gonzales, 440 F.3d 1050, 1053-54 (8th Cir. 2006) ("where the BIA reverses the IJ's order granting cancellation of removal, the BIA, in essence, gives effect to the IJ's order of removability, for the BIA decision eliminates the impediments to removal"); Del Pilar v. United States AG, 326 F.3d 1154, 1156 (11th Cir. 2003) (BIA's reversal of discretionary relief reinstates prior order of removal); see also Delgado-Reynua v. Gonzales, 450 F.3d 596, 601 (5th Cir. 2006) (same). The Ninth Circuit has declined to construe a [*55] finding of removability as satisfying the statutory demand for an order of removal, on the ground that such a construction "would render the IJ's discretionary ability to literally 'cancel removal' meaningless, because a finding of removability in the first instance is a prerequisite to such discretionary relief." Molina-Camacho v. Ashcroft, 393 F.3d 937, 940-41 (9th Cir. 2004) (citing 8 U.S.C. § 1229b(b)(1)). However, the opinion [**6] in Molina-Camacho does not consider the statutory definition that equates a finding of removability with an order of removal. Accordingly, we join the majority of circuits in concluding that the need for an "order of removal" is satisfied by an IJ's finding of removability.[1]

---

[1] The government's alternative argument is that the BIA is empowered to issue orders of removal in the first instance, as an "administrative officer to whom the Attorney General has delegated the responsibility," within the meaning of 8 U.S.C. § 1101(a)(47). Because we hold that an order of removal was issued by the IJ, we do not decide whether the Attorney General has in fact delegated to the BIA the authority to issue orders of removal.

We have considered petitioner's remaining arguments and find each of them to be without merit. For the foregoing reasons, the petition for review is denied.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A91 210 308 – New York
Date: Aug 31 2004

[Entered August 31, 2004]

In re: RIGOBERTO LAZO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Peri Edelman, Esquire

ON BEHALF OF DHS:
Michael Lonoff
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)]

Crime involving moral turpitude

APPLICATION: Waiver of inadmissibility

ORDER:

PER CURIAM: The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has appealed the Immigration Judge's May 29, 2003, grant of a waiver of inadmissibility to the respondent, a native and citizen of El Salvador. The DHS's appeal is sustained.

Section 212(c) of the Act provides, in pertinent part, that aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of 7 consecutive years, may be admitted in the discretion of the Attorney General without regard to certain specified grounds for exclusion enumerated in section 212(a) of the Act, 8 U.S.C. § 1182(a). An alien bears the burden of demonstrating that his application for section 212(c) relief merits favorable consideration. *Blackwood v. INS*, 803 F.2d 1165 (11th Cir. 1986); *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). This Board has enunciated several factors to be considered in determining whether or not to grant an alien such relief. *Matter of Marin*, *supra*. Among the factors deemed adverse to an applicant are the nature and underlying circumstances of the removal ground at issue; the presence of additional significant violations of this country's immigration laws; the existence of a criminal record and, if so, its nature, recency, and seriousness; and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this

country. *Id.* at 584. Favorable factors include the presence of family ties within the United States, residence of long duration in this country, evidence of hardship to the alien and his family if removal occurs, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to an alien's good moral character. *Id.* at 584-85.

We note that the respondent's equities include his status as a legal permanent resident of the United States for 14 years and his United States citizen child. In addition, the respondent supports his child, works full time and owns a home. However, given the seriousness of the respondent's crime, we do not sustain a waiver of inadmissibility in discretion. The respondent was convicted of Sexual Abuse in the First Degree. *See* Exhs. 1, 5. The respondent sexually abused a 10 year old girl while she was sleeping. Given the particular seriousness of his criminal record, we do not find upon weighing the positive and negative factors, that he merits a favorable exercise of discretion. *See* DHS's Brief on Appeal, April 7, 2004.

Accordingly, the DHS's appeal is sustained and the respondent is ordered removed from the United States to El Salvador.

s/Neil P. Miller/
FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEW YORK, NEW YORK

File A 91 210 308 May 29, 2003

[Entered May 29, 2003]

In the Matter of

RIGOBERTO LAZO,
Respondent

IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act

APPLICATION: A waiver under Section 212(c) of the Immigration and Nationality Act

ON BEHALF OF RESPONDENT:
Peri Edelman, Esquire

ON BEHALF OF SERVICE:
Michael Lonoff, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is 38 years old. He is a married male native and citizen of El Salvador. He last arrived in the United States on or about June

24th, 1998 and requested permission to return as a permanent resident. Although he had made a trip prior to that date, and after the date of the conviction of January 24th, 1994. He was placed in removal proceedings on that date, which is June 25, 1998 by issuance of a Notice to Appear, which is Exhibit 1 in the record of proceedings. The respondent was charged with inadmissibility under Section 212(a)(A)(i)(I) of the Immigration and Nationality Act, as a person having been convicted of a crime involving moral turpitude, as alleged in allegation 7 of the Notice to Appear. The respondent through counsel conceded service, conceded the allegations, conceded the charge. He seeks at this point relief under Section 212(c) and a waiver of the grant of inadmissibility. The case, obviously from the record, was adjourned several times because of the possibility he would be eligible for citizenship, which ultimately was denied by the Government. The respondent at one point, it was unclear whether or not he would be eligible for relief, but given the change in the law in the St. Cyr decision, the respondent is eligible for this relief, in view of the fact that he has now filed this application under Section 212(c), rather than cancellation, because the cancellation application had this obvious problem of whether or not he was cut off from time.

The respondent has one arrest and conviction for an incident that took place May 16th, 1993. The respondent was charged with sexual abuse in the first degree under New York State Penal Law 130.65, and he in fact pled guilty to that particular section without being reduced. In addition to the plea, the respondent was sentenced to a term of

imprisonment of 60 days and probation of five years. There was also an order of protection issued. Penal Law Section 130.65, sexual abuse in the first degree, occurs when there is physical contact, sexual contact with an individual who is less than 11 years old. That's the situation we have here. It's under Section 130.65(3).

The respondent was placed on probation. He was discharged early on October 26th, 1996. There was a letter dated November 23rd, 1998, which is Exhibit 8, to a reply brief that was filed July of 2000.

The respondent was a little confused about the date he came to the United States. He consistently in other evidence, including on the cancellation application, indicated that he came to the United States May 3rd, 1981, and I think that is the correct date, although he actually thought it might be 1980. He became a lawful permanent resident in 1990, as a result of having been a lawful temporary resident in 1988, which was pursuant to the amnesty program.

Again, it appears that the respondent was able to travel after the conviction but prior to the issuance of the NTA, despite any problems, because at that point the Government had not placed him in proceedings, but clearly he is properly in proceedings at this point. At the time that he came back into the United States, he was forthright with the Government in connection with an airport statement, and told them the truth, which is that he was sentenced to 90 days, either it was 90 days, it apparently seems to be 60 days, but he was

sentenced and then also was sentenced to five years probation. He was very forthright about what happened, and was correct that he was convicted because of sexual contact with this child that was under the age of 11. The respondent, at the time he came into the United States last in 1998, did tell the Immigration Service that he felt bad about what happened, because he wanted to become a citizen and a police officer.

The respondent, his sister, and his wife all testified today. Because of the serious nature of the conviction, even if it is not an aggravated felony, I'm clear the respondent must demonstrate unusual and outstanding equities. I've relied on the Board's decision in the Matter of Buscemi and Matter of Morin. The Board decision in Matter of Morin in particular talks about balancing the positive and negative factors, including the serious nature of the crime, any other criminal activity, length of time in the United States, and the like. Despite the very serious crime, I do think the respondent has demonstrated the requisite equities, and that the application should be granted, based on the following reasoning.

The crime is obviously a very serious crime, and as the respondent himself in his own words said, this is a crime against a child, and he said a child who did not deserve it. That could not be more the truth. That is a very serious matter. Sexual abuse against children is obviously a horrendous, horrendous crime. The respondent was a little bit vague about whether or not he thought about committing this crime before the actual incident. It

closer in time to the event in connection with the therapy that he was required to go to. He was a little bit more forthright about the fact that this was not a momentary, spur of the moment compulsion, but something that was leading up to this event, although I must admit he's been basically consistent with what he told the therapist.

He testified that in 1992 he was living with a girl friend. She had children. There were three children, two boys, one girl. The incident took place when the mother was not at the home. It is not important to me whether or not she was at church or the grocery store. She was out of the home is the important issue. It was in the morning. The respondent admitted that he touched this child, to quote him, he said her private parts. So obviously it's the vagina. He said he stopped right away, because it realized it was wrong. He said he was very sorry to her. That's more or less what she said in the statement, which is included in the conviction record and the PSI.

The respondent testified that he immediately became very scared about what he had done. He went to see his father. The respondent then went home to where his girlfriend was living, where he had been living. By this point she knew the whole story, and he described the fact that the girlfriend became violent with him. I am sure she did, and I would imagine that she had good reason under the circumstances. She then called the police. Initially he denied it, but he said then later on he did admit it. He was arrested. He was bailed out a week later. Respondent testified that he told his entire family,

as well as this child's family, that he was very sorry about what had happened. He said ultimately after a year they forgave him.

In total, he was in jail for three weeks. He was required to do counseling, and according to the PSI, he was unable to get immediate counseling, and did so privately, although apparently not required to do so. He then continued with counseling with the court-ordered counseling after that.

As a sex offender, he is required to register under Megan's law, which I need not describe, since that is something we are all familiar with, and he continues to register as required.

He met his current spouse, and they have a United States citizen child born November 2nd, 1999. They were married July 26th, 2000 in the United States. The respondent testified that his parents are both deceased. He has several brothers that are in El Salvador, at least most of the time. He has two sisters who live in the United States, one of whom is a citizen, one of whom is a lawful permanent resident. There are various nieces and nephews. He said he is highly involved in his son's care. He testified it would be a great hardship if he had to go back to El Salvador, because there was no work there, and that in the United States his son has health insurance through the respondent's employment. Additionally, he said that he has to help one of the brother's in El Salvador financially, because life is very difficult there.

It seems he has had the same employment in the United States for some time, although there was an interruption during the period of a car accident, but he has apparently been there for some time. He has filed tax returns. He apparently owns a home in New York State on Long Island that he is not living in currently. He testified it's because his wife didn't want to remain there living with the respondent's brother who lives there. That is why they got their own apartment.

Regarding this incident, this crime, he said that he feels very badly for the child, that he wished it never would have happened, that she did not deserve at all what he did to her, and that basically, the account of the crime in the pre-sentence report is actually correct, which is a little bit more than what he had said on direct testimony, but he said it is correct. Whether or not he viewed her as being a mature women, obviously she was not. She was a child. There is absolutely no excuse for this behavior under any circumstances, which I think he understands.

It is interesting to me that the PSI says that he didn't minimize his behavior. While it seems that he might have minimized his behavior in his testimony today, when confronted with the PSI, he said it's actually the truth, that he forgets a lot of things. This is a long time ago. I would imagine that he would not necessarily have forgotten this incident, but this has gone on 10 years at this point. It seems to me that if he wanted to minimize his involvement, he would have done that in connection with the criminal proceeding, rather than here, since

I am assuming he knew we had all these materials, since his lawyer got them. It would make no sense to me that he would try to minimize the event now, since he apparently came forward immediately in quite an unusual manner, according to the PSI, and took full responsibility for his actions, and even at that point expressed remorse, which again, according to the PSI, is apparently unusual.

The respondent repeated said that he is sorry, that he will never do this again, that he knows what he did is wrong, that he in particular feels that children should be protected. In part that seems to be because he has his own child and understands a little bit better what that means.

Regarding his wife, she does not have any status in the United States, she does not speak Spanish, he does not speak Polish. That is consistent with what she said. Neither of them has been to each other's country. They are both not sure whether or not either of them could immigrate legally to the other person's country. That would be he to Poland, she to El Salvador.

Respondent said that everybody knew the circumstances of this incident, but I will comment on that in a moment about the wife and the sister's testimony.

The discharge from counseling talks about being at risk for re-offending. He says he believes he is not at risk for re-offending, because he knows now what it is to protect children, in particular because he has a son. I was interested in why he pled guilty

to the initial charge, since that is in my view somewhat unusual. He said that he pled guilty right away, because they wanted this child to come and testify, and he said that he didn't want her to have to go through this, and because that, in addition to apparently the fact that they offered him probation, he decided to just plead guilty to the initial charge.

Regarding Megan's law, he said that if he fails to register as required, he would be sent back to jail. He was advised by the therapist not to go to playgrounds or be near schools where children are. He indicated he told his wife about what had happened about a year or a year and a half after they met. That is roughly what she said. She said about a year, because he felt that he had to know him. The record supports his testimony. There have been no arrests anywhere else in the world.

Respondent's sister testified that she knew about the arrest from the beginning, but it seemed a little unclear to me whether or not she absolutely thought he was guilty. It seemed to me that she thought he really hadn't done this, but he pled guilty because he was going to be in jail for a long time otherwise. That is most of what she said. At the very end of her testimony, she said that the respondent did tell her that he had touched this child. That's very ambiguous. The primary thing that she mentioned was that she really didn't think he was guilty, and she really thought he did this because he was under a lot of pressure to get out of jail. So that is hard to evaluate her testimony in terms of rehabilitation and in terms of whether or not she allows him to be alone with her disabled

daughter, who is age nine, since I am not sure she really thinks he ever did this at all, even if he told her he was guilty. It is just very difficult to evaluate this testimony. She did indicate, however, that in terms of his involvement with the nieces and nephews, that she viewed him as begin more careful with his relationships with the girls, and she did say she was not afraid to leave the respondent with her disabled daughter, even though her child is unable to speak. Frankly, given the ambiguity there, I really can't give that a lot of weight.

The respondent's spouse also testified. Likewise, her testimony is difficult to evaluate in terms of what she really knew about what happened. Frankly, I think everybody is telling the truth. I don't think that is a problem. I think that they are not entirely sure if he was guilty, or they don't want to believe he was guilty. Initially she said that she knew that he was charged with child abuse, because he touched a girl by accident, because he was trying to reach the telephone. Now that does not sound to me like somebody who knows that the respondent was actually guilty of sexual abuse in plain meaning. She said that she had never heard that he had touched her sexually. She really didn't know how exactly what had happened. The spouse testified that the respondent did tell her he was guilty, but what does that mean? Does that mean he was guilty of accidentally touching this child, or intentionally touching the child. She said that she thinks he is guilty. It is a very serious case, and he is guilty, but again, I'm not sure if that means that he was accidentally guilty or what exactly. I don't know.

She testified that he is a very good father and husband. That is similar to the testimony that his sister gave. She testified that she would go with her husband, but she really, for the reasons I had already mentioned, given their different citizenship and language abilities, are just frankly not sure where they would go.

I don't mean to say that the spouse as minimizing the serious nature of this kind of conviction. I think she understands clearly the sexual abuse of a child is a serious matter. I'm just not entirely convinced that she knows exactly how involved and how responsible her husband was in this incident. So that is given diminished weight in terms of his rehabilitation, because I don't know if she can really comment about any recidivism or anything like that, since I'm not satisfied that she really believes he actually did this.

That is not the only example of rehabilitation, however. The negative factor is obvious. I really don't even need to go through that, nor repeat the graphic nature of the offense. It is obviously an extremely serious crime against an innocent child.

The report from the therapist discharging the respondent from therapy says that the respondent is at risk of re-offending, but frankly, without a more detailed report from an expert, I can't tell if that means that this is specific respondent because of his personal circumstances, or whether or not all sex offenders generally are considered to be at risk of re-offending. I'm more inclined to believe the latter, frankly, that all sex offenders are viewed as being at

risk for re-offending. Not to say that the respondent then is more at risk than the average sex offender, but just that he's in a similar situation to other sex offenders.

The positive factors re obviously the fact that the respondent has been in the United States for over 20 years, using the May 3rd, 1981 date, which I think is correct, since a very young age. His ties to the United States include two siblings. The hardship to them has not been demonstrated in the record, so I really don't have any evidence of that, although they apparently spend time together, based on the testimony of his sister that he's involved with the nieces and nephews and takes them to the movies and the like.

The hardship to the wife is diminished by the fact that she's not lawfully in the United States, although they met and married in the United States. That is offset somewhat by the fact that they are from two different countries, with two different languages, two different cultures, where neither one of them have been. That would be a significant problem for them, I think, to figure out where they would go. I'm assuming they could go legally to one or both of those countries and bring their spouses. I think it's just more in terms of the language and culture and readjusting to places where they've never been, since their entire life has been together in the United States, and they do have the citizen child. Hardship to him is somewhat diminished by his young age, but nonetheless, that is a significant equity in the United States.

The respondent has a consistent employment history, which demonstrates payment of taxes, and property ownership, which is a positive factor. There is one arrest. The fact that there is one arrest is a positive factor. Obviously the fact , again, of the serious nature of the arrest is a serious negative factor.

It is interesting to me that he pled guilty immediately to the original charge and took full responsibility immediately. Again, the PSI report indicates that that is somewhat exceptional, and apparently part of his motivation was to not put this young girl through any more trauma, so that shows some recognition of what he did and some level of remorse and rehabilitation, I think. He was originally sentenced to five years probation, but was released early because of good behavior. That's a positive factor. As a result, he was discharged from counseling in 1996.

The event in question, which led to the conviction, was May 16, 1993. At this point it is very close to 10 years ago. That's a significant period of rehabilitation, I think. The respondent clearly is remorseful. That was obvious at the time of his arrest, the time that he was stopped at the airport, and again in court today. I do think he is sorry about this. I believe he has made good efforts at rehabilitation. The 10 years is significant. He hasn't re-offended in the 10 years, which is good. While thee is no guarantees, I am hopeful that he will continue in this rehabilitation.

Balancing the length of time without any other problem, the fact that it is only one, and the other equities in the record, I am concluding that the respondent has demonstrated the requisite hardship and equities and rehabilitation. For that reason, the application will be granted in the exercise of discretion.

Accordingly, the following order is entered.

ORDER

IT IS ORDERED that the respondent be granted a waiver under Section 212(c) of the Immigration and Nationality Act.

IT IS FURTHER ORDERED the respondent be readmitted to the United States as a returning lawful permanent resident, and he provided with documentation consistent with that decision.

Margaret McManus
Immigration Judge

8 U.S.C. § 1101 (a)(47)(A)

(47)(A) The term "order of deportation means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.

No. 06-935

In the Supreme Court of the United States

RIGOBERTO LAZO, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, when an immigration judge (IJ) finds an alien removable but grants discretionary relief from removal, the Board of Immigration Appeals has authority to order the alien removed upon overturning the IJ's grant of discretionary relief.

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In the Supreme Court of the United States

No. 06-935

RIGOBERTO LAZO, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 462 F.3d 53. The decisions of the immigration judge (Pet. App. 10-23) and the Board of Immigration Appeals (Pet. App. 7-9) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2006. The petition for a writ of certiorari was filed on November 29, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides for removal of an alien from the United States upon entry of an order of removal. See 8 U.S.C. 1227(a) (2000 & Supp. IV 2004); 8 U.S.C.

1231(a). The INA defines an "order of deportation"—now an "order of removal"—as follows:

> (A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.
>
> (B) The order described under subparagraph (A) shall become final upon the earlier of—
>
> (i) a determination by the Board of Immigration Appeals affirming such order; or
>
> (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

8 U.S.C. 1101(a)(47).[1]

2. Petitioner, a native and citizen of El Salvador, first came to the United States in 1981, and became a lawful permanent resident in 1990. Pet. App. 10, 12. On January 24, 1994, petitioner was convicted on a plea of guilty of sexual abuse of a child less than 11 years old, in violation of New York law. *Id.* at 11. He was sentenced to 60 days of imprisonment and five years of probation. *Id.* at 11-12.

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[1] Because the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, "did away with the previous legal distinction among deportation, removal, and exclusion proceedings," *United States* v. *Pantin*, 155 F.3d 91, 92 (2d Cir. 1998), cert. denied, 525 U.S. 1086 (1999), the term "order of removal" includes statutory references to "order of deportation" and "order of exclusion," see *id.* at 93.

Petitioner last arrived in the United States on June 24, 1998, and requested permission to return as a lawful permanent resident. Pet. App. 10-11. On June 25, 1998, petitioner was placed in removal proceedings and was charged with being inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I) as a person convicted of a crime involving moral turpitude. Pet. App. 11. Petitioner conceded the factual allegations of the Notice to Appear and conceded the charges against him, but applied for a discretionary waiver of removal under former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994). Pet. App. 11.[2]

3. The immigration judge (IJ) issued her decision on May 29, 2003. The IJ observed that "respondent through counsel conceded service [of the Notice to Appear], conceded the allegations, conceded the charge. He seeks at this point relief under Section 212(c) and a

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[2] Under former Section 212(c), a permanent resident alien with "a lawful unrelinquished domicile of seven consecutive years" could apply for discretionary relief from deportation. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001). The applicant for relief bore the burden of demonstrating that his application merited favorable consideration. *In re Marin*, 16 I. & N. Dec. 581 (BIA 1978). "When considering a 212(c) application, an immigration judge 'must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of Section 212(c) relief appears in the best interests of this country.'" *Lovell* v. *INS*, 52 F.3d 458, 461 (2d Cir. 1995) (quoting *In re Marin*, 16 I. & N. Dec. at 584) (listing factors for consideration)). In IIRIRA, Congress repealed 8 U.S.C. 1182(c) (1994), see Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, and replaced it with 8 U.S.C. 1229b, which provides for a new form of discretionary relief known as cancellation of removal. Relief under former Section 212(c) nonetheless remains available for aliens, such as petitioner, whose convictions were obtained through a plea agreement and who would have been eligible for relief under the law then in effect. See *St. Cyr*, 533 U.S. at 314-326.

waiver of the grant of inadmissibility." Pet. App. 11. The IJ determined that petitioner was eligible for relief under Section 212(c) in light of this Court's decision in *St. Cyr*. *Ibid.* She then concluded that, "[b]alancing the length of time [since petitioner's conviction] without any other problem, the fact that it is only one, and the other equities in the record, * * * [petitioner] has demonstrated the requisite hardship and equities and rehabilitation." *Id.* at 23. The IJ therefore granted relief under former Section 212(c) in the exercise of discretion.[3]

On August 31, 2004, the Board of Immigration Appeals (BIA) sustained the government's appeal of the IJ's grant of relief from removal. Pet. App. 7-9. The BIA noted the equities in petitioner's favor, *i.e.*, "his status as a legal permanent resident of the United States for 14 years and his United States citizen child." *Id.* at 9. The BIA also reviewed "the seriousness of [petitioner's] crime," in that he had "sexually abused a 10 year old girl while she was sleeping." *Ibid.* The BIA "weigh[ed] the positive and negative factors" and determined that, "[g]iven the particular seriousness of his criminal record," petitioner did not "merit[] a favorable exercise of discretion." *Ibid.* The BIA therefore ordered petitioner removed to El Salvador. *Ibid.*

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[3] The IJ did not make an explicit finding that petitioner is removable. See 8 U.S.C. 1229a(c)(1)(A) ("At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States."). The IJ's grant of a waiver of removal under Section 212(c), however, presupposes that she had found petitioner removable. The court of appeals accordingly addressed the case on the understanding that the IJ had "found [petitioner] removable." Pet. App. 2. Petitioner does not dispute that understanding but instead agrees that the "Immigration Judge found the Petitioner removable," Pet. 1.

4. The court of appeals denied the petition for review. Pet. App. 1-6. The court rejected petitioner's argument that the BIA had exceeded its authority by ordering that petitioner be removed rather than remanding the proceedings to the IJ for entry of an order of removal. The court declined to decide whether the BIA has authority to issue an order of removal in the first instance. *Id.* at 4, 5 n.1. The court instead concluded that, regardless of whether the BIA has authority to issue an order of removal in the first instance, the statutory requirement for an order of removal is "satisfied when—as here—the IJ *either* orders removal or concludes that an alien is removable." Pet. App. 4.

The court explained that its conclusion was compelled by the language of 8 U.S.C. 1101(a)(47)(A), which defines an "order of deportation" in the disjunctive as an order of a special inquiry officer "concluding that the alien is deportable *or* ordering deportation." *Ibid.* (emphasis added); see 8 C.F.R. 1.1(l) (1996) (providing that an IJ is a "special inquiry officer"). The court explained that the BIA therefore had not ordered petitioner removed in the first instance, but had instead, by overturning the IJ's grant of relief from removal under former Section 212(c), "removed an impediment to the removal that was ordered by the IJ." Pet. App. 4. The court observed that its understanding was consistent with that of three of the four courts of appeals that had previously considered the question. *Id.* at 5 (citing *Solano-Chicas* v. *Gonzales*, 440 F.3d 1050, 1053-1054 (8th Cir. 2006); *Del Pilar* v. *United States Att'y Gen.*, 326 F.3d 1154, 1156 (11th Cir. 2003); and *Delgado-Reynua* v. *Gonzales*, 450 F.3d 596, 601 (5th Cir. 2006). The court further observed that, although the Ninth Circuit had reached a contrary conclusion in *Molina-*

Camacho v. *Ashcroft*, 393 F.3d 937, 940-941 (2004), that court had not considered the definition of an order of removal in 8 U.S.C. 1101(a)(47)(A), which "equates a finding of removability with an order of removal." Pet. App. 5.

ARGUMENT

1. Petitioner contends (Pet. 3-8) that the BIA exceeded its authority in ordering that petitioner be removed, and that the BIA instead was required to remand to the IJ for entry of an order of removal. The court of appeals correctly rejected that argument. As the court explained, the INA defines an order of removal as "the order of the [IJ] * * * concluding that the alien is deportable *or* ordering deportation." 8 U.S.C. 1101(a)(47)(A) (emphasis added); see Pet. App. 4 ("[T]he statutory requirement of an order of removal is satisfied when—as here—the IJ either orders removal or concludes that an alien is removable."). In this case, the IJ found that petitioner is removable, but then granted discretionary relief from removal under former Section 212(c). *Id.* at 2; see note 3, *supra*. The IJ's determination that petitioner is removable constituted an order of removal within the meaning of 8 U.S.C. 1101(a)(47)(A). Accordingly, when the BIA overturned the IJ's grant of Section 212(c) relief, the BIA "removed an impediment to the removal" that had already been "ordered by the IJ." Pet. App. 4. There is no need for the BIA to remand for entry of an order of removal in that situation. Instead, the BIA, as it did in this case, can order removal based upon the order of removal already entered by the IJ. *Id.* at 4-5.

Petitioner errs in relying (Pet. 7) on 8 C.F.R. 1240.13(d). That regulation provides: "If the immigra-

tion judge decides that the respondent is removable *and orders the respondent to be removed*, the immigration judge shall advise the respondent of such decision, and of the consequences for failure to depart under the order of removal." 8 C.F.R. 1240.13(d) (emphasis added). Petitioner contends that the IJ failed to provide the requisite warnings in this case. The IJ was not required to do so, however, because he did not order petitioner removed, but instead granted petitioner a waiver of removal under former Section 212(c).[4]

2. Petitioner observes (Pet. 3, 6-7) that the courts of appeals have issued conflicting decisions on whether the BIA can order an alien's removal when, as in this case, an IJ finds an alien removable but grants discretionary relief and the BIA subsequently overturns the grant of discretionary relief. That conflict does not warrant this Court's review.

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[4] Petitioner appears to suggest (Pet. 4) that the BIA's order that he be removed is inconsistent with 8 U.S.C. 1229a(a)(3), which provides that, "unless otherwise specified in this chapter," removal proceedings conducted by an IJ "shall the sole and exclusive procedure for determining whether an alien may be * * * removed from the United States." In this case, the IJ conducted a removal proceeding and found that petitioner was removable, which, as explained, qualifies as an order of removal under 8 U.S.C. 1101(a)(47)(A). Petitioner's argument also fails to acknowledge that the INA recognizes exceptions to the "sole and exclusive procedure." 8 U.S.C. 1229a(a)(3). For example, the INA authorizes the Attorney General to conclude that aliens are removable, to order their removal, and to delegate authority to any administrative officer other than an IJ. See 8 U.S.C. 1101(a)(47)(A); 8 U.S.C. 1103(a)(1), 1103(g) (2000 & Supp. IV 2004). The Attorney General has delegated that authority to the BIA. See, *e.g.*, 8 C.F.R. 1241.31 (power to issue removal orders), 1003.1(d)(3)(ii)(authority to conduct *de novo* review), 1003.1(d)(6) (2004) (power to issue final decisions).

Four courts of appeals, in agreement with the court below, have concluded that the BIA has authority to order removal in the circumstances of this case because an IJ's finding that an alien is removable qualifies as an order of removal within the meaning of 8 U.S.C. 1101(a)(47)(A). See *Guevara* v. *Gonzales*, 472 F.3d 972, 975-976 (7th Cir. 2007), petition for cert. pending, No. 06-1369 (filed Apr. 9, 2007); *Delgado-Reynua* v. *Gonzales*, 450 F.3d 596, 600-601 (5th Cir. 2006); *Solano-Chicas* v. *Gonzales*, 440 F.3d 1050, 1054 (8th Cir. 2006); *Del Pilar* v. *United States Att'y Gen.*, 326 F.3d 1154, 1156 (11th Cir. 2003). Although the Ninth Circuit has issued a decision reaching the contrary conclusion, *Molina-Camacho* v. *Ashcroft*, 393 F.3d 937, 940 (2004), that opinion did not discuss or consider that the definition of "order of removal" in 8 U.S.C. 1101(a)(47)(A) encompasses an order finding that an alien is removable. See *Molina-Camacho*, 393 F.3d at 941 ("There is no statutory authority * * * that supports the assertion that a finding that a petitioner is removable is the same thing as an order of removal and, indeed, the Government points to none on appeal."). Moreover, the status of the Ninth Circuit's holding in *Molina-Camacho* is unclear: The Ninth Circuit has granted en banc review to reconsider the issue in *Lolong* v. *Gonzales*, 452 F.3d 1027 (2006) (granting en banc rehearing).

In *Lolong*, the IJ found that the alien was removable but granted her application for asylum. The BIA sustained the government's appeal, vacated the IJ's grant of asylum, and ordered the alien removed. See *Lolong* v. *Gonzales*, 400 F.3d 1215, 1218 (9th Cir. 2005). A panel of the Ninth Circuit granted the alien's petition for review, found that substantial evidence supported her eligibility for asylum, and remanded for the Attorney Gen-

eral to exercise his discretion concerning whether to grant asylum. See *id.* at 1225. After the government filed a petition for rehearing en banc, the Ninth Circuit issued an order directing the parties to address, *inter alia*, whether the court had jurisdiction to decide the petition for review under its decision in *Molina-Camacho*, in light of that decision's holdings that the BIA exceeds its authority by ordering an alien removed and that the court of appeals lacks jurisdiction over a petition for review in that situation because no final order of removal has been entered. App., *infra*, 1a-2a; see 8 U.S.C. 1252(a)(1) (conferring jurisdiction in the court of appeals to review a "final order of removal"). The court also asked the parties to address, *inter alia*, whether the en banc court should revisit the panel disposition in *Molina-Camacho*. App., *infra*, 2a. The government responded that the court lacked jurisdiction under its decision in *Molina-Camacho*, and that the court should reconsider that decision en banc. The Ninth Circuit subsequently granted en banc rehearing. 452 F.3d 1027 (2006). Because the Ninth Circuit, as part of its en banc proceedings in *Lolong*, presumably will consider whether to overturn the panel disposition *Molina-Camacho*, there is no warrant for this Court to grant review of the conflict raised by the petition.[5]

Finally, any decision by this Court to the effect that the BIA was required to remand the case to the IJ to issue an order of removal would not change the conclusion of the IJ that petitioner is removable (a conclusion that petitioner has not disputed, see Pet. App. 3). And the BIA has already determined that petitioner does not

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[5] The Ninth Circuit heard oral argument en banc in *Lolong* on October 10, 2006, but the court has not issued its decision.

warrant discretionary relief from removal under former Section 212(c). Accordingly, a decision by this Court would not ultimately affect petitioner's removal from the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2007

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-72384
Agency No. A77-427-355

MARJORIE KONDA LOLONG, PETITIONER,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

Filed: Oct. 4, 2005

ORDER

Before: B. FLETCHER, NOONAN, and THOMAS, Circuit Judges:

Although both parties assert that we have jurisdiction, the court has an independent obligation to determine whether it has jurisdiction. We now require simultaneous supplemental briefing and request the parties address the following issues:

(1) Whether we have jurisdiction to decide the merits of the above-captioned matter in light of *Molina-Camacho v. Ashcroft*, 393 F.3d 937 (9th Cir. 2004), which held that the BIA had "acted *ultra vires* in issuing a deportation order instead of remanding to the IJ" and

that we lacked jurisdiction on appeal because there is no final order of removal to review, *see id.* at 941;

(2) Whether, in light of the Real ID Act of 2005, which removed jurisdiction from the district court to entertain habeas appeals from an order of removal, *see* 8 U.S.C. § 1252(a)(5), and in light of *Molina-Camacho*'s holding, there is any remedy available to the petitioner in this court;

(3) Whether, if no remedy is available in this court or the district court, the lack of a remedy raises constitutional problems that are appropriate and necessary for us to address in this appeal, including whether we should ask an en banc court to revisit our decisions in *Molina-Camacho* and *Noriega-Lopez v. Ashcroft*, 335 F.3d 874 (9th Cir. 2003).

Simultaneous supplemental briefs shall be filed on or before October 25, 2005. The briefs shall not exceed twenty-five (25) pages. Fifty (50) copies shall be submitted to the Clerk of the Court.